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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1111

ROBERT MUSE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

From a verdict of guilty of receiving stolen goods, and judgment of imprisonment entered by the Superior Court on 23rd day of September, 1970, defendant appealed to the North Carolina Court of Appeals. The opinion of the North Carolina Court of Appeals (Intermediate Appellate Court) awarding petitioner a new trial is reported at 11 N. C. App. 389, 181 S. E. 2d 207. The State's petition for Writ of Certiorari to the North Carolina Court of Appeals was allowed by the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina, reversing the North Carolina Court of Appeals and affirming the conviction of the trial court, is reported at 280 N. C. 31, 185 S. E. 2d 214.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. §1257(3).

QUESTIONS

I

DID THE TRIAL COURT ERR IN ITS *VOIR DIRE* FINDINGS AND IN ALLOWING INTO EVIDENCE INCRIMINATING STATEMENTS AMOUNTING TO A CONFESSION OF THE PETITIONER WHEN HE WAS NEVER ADVISED OF HIS CONSTITUTIONAL RIGHTS?

II

DID THE CONFESSION OF THE PETITIONER EMANATE FROM MENTAL COERCION IN THE FORM OF HOPE OF REWARD?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The petitioner was charged on a bill of indictment with breaking and entering and larceny, and with receiving stolen goods, knowing them to be stolen. On February 25, 1970, petitioner appeared in the Superior Court of Pasquotank County with counsel and a plea of not guilty was entered. The case was set for trial the next day, but the petitioner failed to appear. He was later apprehended and returned to Pasquotank County jail. He escaped from that jail but was again apprehended and held to await trial. Upon petitioner's motion, a change of venue to Camden County was ordered. The case was eventually tried at the September 21, 1970, Session of Camden. Petitioner was tried only on the charge of receiving stolen property. Petitioner, through counsel, entered a plea of not guilty. From a verdict of guilty and judgment providing for imprisonment, the petitioner appealed. The North Carolina Court of Appeals ordered a new trial. The Supreme Court of North Carolina allowed respondent's petition for Writ of Certiorari, reviewed the decision of the Court of Appeals and reversed that decision. Copies of the opinions of the North Carolina Court of Appeals and the Supreme Court of North Carolina are appended to the petition.

STATEMENT OF FACTS

The questions raised by the petitioner pertain to the testimony of State Bureau of Investigation Agent Wise and the findings of fact and conclusions of law of the trial court upon the *voir dire* examination of Agent Wise. The testimony of Agent Wise upon *voir dire* is set forth in full in the Petition under "Statement of the Case". This testimony may be summarized as follows:

Agent Wise made several visits to petitioner's jail cell during the period from 12 June, 1969, to

15 July, 1969. Each visit was made pursuant to a request by the petitioner. Petitioner asked his help toward getting a smaller appearance bond. The agent tried to contact a judge but was then unable to do so and so advised the petitioner. Petitioner told the agent that he might have some information that would be of interest to the agent in *OTHER* cases. The agent told the petitioner that if he gave him any such information, he would appreciate it. The petitioner still wanted assistance in getting his bond lowered. The agent, on numerous occasions, told the petitioner that he was a police officer and that he could make him no promises, but that if he gave any information in solving any cases, the agent would "let it be known". The agent did not caution the petitioner of his constitutional rights because he did not go to interrogate the petitioner, but went there at the petitioner's request. The agent further testified that "(t)he statements he gave me were voluntary on his part without prompting by me". The petitioner did, in fact, supply the agent with information relative to several other crimes. The agent testified: "My conversation and questioning with the defendant was relative to obtaining information concerning these other crimes when I went to see him. It was during the course of these conversations that he related to me the fact that he had purchased the tools that he sold Mr. Hudson, from a third party, and that he paid $90.00 for them. I did not in any way solicit that information from him and had no knowledge that it was coming until he told me." (The tools sold to Mr. Hudson were the tools involved in this action.) The petitioner offered no evidence on *voir dire*.

The portion of the trial court's findings of fact and conclusions of law upon this *voir dire* to which error has been assigned is set forth in the petition under "Statement of the Case". For the benefit of this Court, these findings of fact and conclusions of law are hereinafter set forth in their entirety.

"Upon objection by the defendant to questions propounded by the Solicitor with respect to any

conversation which the witness had with the defendant, the Court had the jury retire and conducted a *voir dire* examination for the purpose of determining whether or not the statements of the defendant to be offered by the State were voluntarily given.

Upon the evidence offered, and after argument of counsel, the Court makes the following Findings of Fact:

(1) At the time in question Mr. O. L. Wise was an officer of the State Bureau of Investigation, having been employed in that capacity continuously since 1962. That on or about June 12, 1969, the defendant, Muse, sent for Mr. Wise and Mr. Wise, in response to the defendant's request, went to see Mr. Muse who was then in custody in the Pasquotank County jail.

(2) The defendant then told Mr. Wise that he, the defendant, was in jail with bond set at $5,000.00; and he did not understand why his bond was so high; that he could not employ counsel unless he could get out and attend to his job, nor could he support his family; and if he was not released from jail he was likely to lose his job. He requested Mr. Wise to contact the judge and see if he could make bond and go back to work. Mr. Wise attempted to contact Judge Horner (District Court Judge), who was not in the County; whereupon, he went back to the jail and told the defendant there was nothing he, Mr. Wise, could do.

(3) Between June 12 and July 15th, 1969, Mr. Wise had several conversations with the defendant. On such occasions the defendant made statements to Mr. Wise which in part were as follows:

> (a) That he, the defendant, did not break and enter the building; that he did purchase the tools; that he paid $90.00 for the tools, and that he made this purchase in his yard. That the tools in

question were those alleged to have been stolen from City Motor Parts, Inc.

(4) In addition to the conversation about the tools, Mr. Wise and the defendant talked about a number of other things, including other alleged crimes.

Mr. Wise did not initiate the conferences; the defendant on the occasion of each conversation sent for Mr. Wise.

(5) Upon indication that he, the defendant, might have useful information, Mr. Wise advised the defendant that he was a police officer and was interested in any crimes committed in the area, or elsewhere, and that any information of interest which could help him would be appreciated. Mr. Wise advised the defendant that he could not make any promises, but that if he gave any information aiding in solving any cases that he, Mr. Wise, would let it be known.

A (6) At no time did Mr. Wise, the officer, initiate the discussions with respect to the alleged breaking and entering into City Motor Parts, Inc., and the larceny of tools in question. B

(7) No "Miranda warning" was given to the defendant by Mr. Wise. At the time of the alleged conversation the defendant was under arrest and was in custody. C Mr. Wise did not request the defendant to make a statement concerning the alleged breaking and entering of City Motor Parts, Inc., and larceny of tools therefrom. The information and above statements of the defendant were volunteered on the occasions when he called for Mr. Wise and when Mr. Wise talked to him at his request in the Pasquotank County Jail. D

E (8) Mr. Wise did not solicit information from the defendant concerning the City Motor Parts, Inc. case. F

G (9) This was not a custodial interrogation, wherein

the questioning *WAS INITIATED* by a law enforcement officer after the person had been taken into custody, or otherwise deprived of his freedom of action. H

I (10) The defendant is an adult, white male, intelligent, and was, before confinement, employed as a steel tier in construction work. There is nothing to indicate the defendant lacked sufficient intelligence and ability to appreciate his circumstances at the time that the statements in question were made, and nothing to indicate a lack of ability to understand what he was doing. J

K (11) The statements of the defendant were voluntarily and understandingly made. L

WHEREFORE, the Court concludes:

M (a) The statements made by the defendant on the occasions in question concerning the tools taken from City Motor Parts, Inc., were voluntarily and understandingly made and are admissible as evidence in this case. N.

O (b) The statements made by the defendant on the occasions in question do not fall within the prohibition of *Miranda v. Arizona*. P"

This September 23rd, 1970.

/s/ Robert D. Rouse, Jr.
Judge Presiding

ARGUMENT

Petitioner's arguments for granting the writ seemed to center around the following propositions:

(1) The inculpatory statements of the petitioner were inadmissible by reason of being induced by an emotion of hope aroused in the petitioner by the statements of Agent Wise.

(2) The inculpatory statements of the petitioner were inadmissible because the defendant was not warned that he had the right of counsel and the right to remain silent.

(3) The trial court erred in its *voir dire* findings by failing to make findings with respect to counsel and as to whether or not petitioner indicated the desire to confer with an attorney.

(4) The inculpatory statements of the petitioner were inadmissible because his right to remain silent and his right to counsel were not knowingly and intelligently waived with full knowledge of the nature and consequences.

It is submitted by the respondent that the applicability of any of these principles to the case at bar turns upon whether the inculpatory statements made by the petitioner to Agent Wise were made in response to interrogation of the petitioner by the agent concerning the offenses charged. If there was no such interrogation, it would appear that all of petitioner's arguments and contentions are without merit.

The testimony of Agent Wise on *voir dire* must be considered contextually. Each of the agent's several visits to the petitioner in jail were as a result of the petitioner's requests to see him. The petitioner volunteered information concerning *OTHER CASES*, and it was such information that the agent indicated he would appreciate and would let be known. The petitioner did, in fact, give information concerning *OTHER CASES*. With respect to the petitioner's inculpatory statements, Agent Wise testified that, "I did not in any

way solicit that information from him and had no knowledge it was coming until he told me". When the *voir dire* testimony is considered contextually, it is apparent that the conversations between the agent and the petitioner were with reference to *OTHER CASES*, that there was no interrogation concerning the offenses charged, and that any statements made by the agent to the petitioner were with reference to information concerning *OTHER CASES* and could not have been interpreted by the petitioner in any other manner.

The respondent contends and it was found by the Supreme Court of North Carolina in its opinion concerning this matter that there was plenary evidence to support the findings of fact made by the trial judge. These findings of fact are set forth in full under the heading: "Statement of Facts" in this Response.

I

THE INCULPATORY STATEMENTS OF THE PETITIONER WERE NOT RENDERED INADMISSIBLE ON THE THEORY THAT THEY WERE INDUCED BY AN EMOTION OF HOPE AROUSED IN THE PETITIONER BY THE STATEMENTS OF AGENT WISE.

The opinion of the Court of Appeals of North Carolina, which ordered a new trial for petitioner, and which was reversed by the Supreme Court of North Carolina, turns upon its determination that, as a matter of law, the petitioner's admission that he purchased the goods in question was prompted by an emotion of hope and was thus involuntary. It relies upon the well-established proposition that a confession induced by hope or extorted by fear is to be rejected. So far as can be ascertained, however, this rule has consistently been applied to factual situations involving an interrogation of defendant concerning the offense with which the defendant was charged or would later be charged.

The Court of Appeals, in support of its holding, relied upon the cases of *State v. Fuqua*, 269 N.C. 223, 152 S. E. 2d 68; *State v. Woodruff*, 259 N.C. 333, 130 S. E. 2d 641; *State v. Gibson*, 2 N.C. App. 187, 162 S. E. 2d 627; and *State v. Roberts*, 12 N.C. 259. All of these cited cases involved factual situations wherein the defendants were actually interrogated about the offense

for which they were eventually convicted, and the representations or promises made in these cases which may have induced those defendants to make the incriminating statements were made specifically with reference to the offenses for which the defendants were convicted. The *FUQUA*, *GIBSON* and *ROBERTS* cases involved actual in-custody interrogation concerning the offense charged wherein certain statements or promises were made bearing directly on attempting to induce the defendants to confess. The *WOODRUFF* case involved a promise by the Sheriff to try to help defendant if the defendant would give information concerning a certain murder if it developed that defendant was involved in the murder. The evidence suggested that the Sheriff was suspicious that the defendant was involved at the time he made these promises.

In the case at bar, the uncontradicted evidence is to the effect that there was absolutely no interrogation of the petitioner concerning the offenses charged. If the agent's statements to the petitioner could be construed as arousing an emotion of hope in the petitioner for some assistance, there is nothing in the record to indicate an understanding on the part of the agent or the defendant that such assistance would be in return for a confession or statement implicating the petitioner in the offenses charged.

It has been held by the Supreme Court of North Carolina that the test to determine whether a confession is voluntary " is whether it was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime that he had not committed " *State v. Grier*, 203 N. C. 586, 166 S. E. 595; *State v. Hudson*, 218 N. C. 219, 10 S. E. 2d 730. Certainly none of the circumstances revealed by the record could reasonably lead the petitioner to believe it would be better to confess to a crime he had not committed.

The respondent submits that, in the context of the discussion, no statement made by Agent Wise could be interpreted as inducing a confession of the petitioner by raising an emotion of hope. If an emotion of hope was raised, it was not done pursuant to an interrogation concerning the offense charged. Consequently, petitioner's arguments with respect to this proposition appear to be without merit.

II

THE INCULPATORY STATEMENTS OF THE PETITIONER WERE NOT RENDERED INADMISSIBLE BECAUSE THE DEFENDANT WAS NOT WARNED THAT HE HAD THE RIGHT TO COUNSEL AND THE RIGHT TO REMAIN SILENT.

This argument seems to be answered by the case of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. In the next to the last paragraph of Sec. 3 of this opinion it is stated that

> ". . . Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk with the police without benefit of warning, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

It must be remembered that the uncontradicted evidence is to the effect that there was no interrogation of the petitioner concerning the offenses charged. All of the agent's visits to petitioner were at the petitioner's request, all conversations were initiated by petitioner, and all conversations between the petitioner and the agent were concerning *OTHER CASES* with reference to which petitioner had offered the information. With reference to the inculpatory statements of the petitioner, the agent testified that, "I did not in any way solicit that information from him and had no knowledge that it was coming until he told me."

Since there was no interrogation, there was no necessity, at this time, to advise the petitioner of his constitutional rights.

III

THE TRIAL COURT DID NOT ERR IN ITS *VOIR DIRE* FINDINGS BY FAILING TO MAKE FINDINGS WITH RESPECT TO COUNSEL, AND AS TO WHETHER OR NOT PETITIONER INDICATED THE DESIRE TO CONFER WITH AN ATTORNEY.

In order for petitioner's arguments upon this point to possess validity, it is submitted that he must have had the right to counsel at the time of, or before, he made the statements to Agent Wise. It is believed there is no authority which would have entitled the petitioner to representation by counsel under the circumstances and at the time that the statement was made. The record will show that the petitioner's preliminary hearing was held on June 5, 1969. This was prior to the effective date of North Carolina General Statute 7A-451 which declared a preliminary hearing to be a critical stage so as to entitle an indigent person to the service of counsel. The effective date of this statute was July 1, 1969. In-custody interrogation is declared by this section to be another such critical stage. Again, the State submits, there was no in-custody interrogation of the defendant. *Coleman v. Alabama*, 399 U. S. 1, 90 S. Ct. 1999 (1970), 26 L. Ed. 2d 387, deals with defendant's constitutional rights to counsel at the preliminary hearing. This case was decided June 22, 1970. Federal Courts in at least three circuits have refused to apply the ruling in *Coleman* retroactively. *Phillips v. State of North Carolina*, 433 F. 2d 659 (4th Cir. 1970); *Konvalin v. Sigler*, 431 F. 2d 1156 (8th Cir. 1970); *United States ex rel Bonner v. Pate*, 430 F. 2d 639 (7th Cir. 1970).

Petitioner did not request an attorney at the time of his conversations with Agent Wise and, under the law as it existed at that time and the facts and circumstances of this case, there being no interrogation, he would not have been entitled to an attorney had one been requested. Therefore, it is submitted that petitioner's arguments and contentions with reference to this proposition are without merit.

IV

UNDER THE FACTS OF THIS CASE THE INCULPATORY STATEMENTS OF THE PETITIONER WERE NOT

RENDERED INADMISSIBLE BECAUSE HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO COUNSEL WERE NOT KNOWINGLY AND INTELLIGENTLY WAIVED WITH FULL KNOWLEDGE OF THE NATURE AND CONSEQUENCES.

Petitioner relies upon excerpts from American Jurisprudence 2d as authority for his contentions on this point. It is believed that none of the cases cited for the broad propositions stated in these excerpts are in point. Petitioner cites 29 Am. Jur. 2d, Evidence, Sec. 529 at page 580 as authority for the proposition that a confession, to be admissible, must be made " with full knowledge of the nature and consequences of the confession." Respondent submits that the case law will limit this proposition to cases involving interrogation concerning the offense charged. *Miranda v. Arizona*, supra, deals exclusively with cases involving actual in-custody interrogation. The case of *State v. Thorpe*, 274 N. C. 457, 164 S. E. 2d 171, cited by the petitioner in support of this proposition, involved actual, active, in-custody interrogation.

The case of *Carnley v. Cochran*, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, cited on page 19 of the petition, involves the question of waiver of right to counsel at trial. The record will show that petitioner had counsel at trial. The respondent has previously shown that petitioner was not entitled to counsel at the time and under the circumstances of his conversations with Agent Wise.

Petitioner also relies on the case of *U. S. v. Blalock*, 255 F. Supp. 268 (E. D. Pa. 1966). That case involved an active, positive request by federal agents to search a room without a search warrant. During the search incriminating evidence was found. There, the Court states that, "(i)n order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved." In the case at bar, the conversations between petitioner and Agent Wise were expressly invited and agreed to by the petitioner.

It is earnestly contended by the respondent that the uncontradicted testimony of Agent Wise on *voir dire* and the findings

of fact by the trial court unequivocally show that there was no interrogation of the petitioner concerning the offenses charged, and that, therefore, the contentions of the petitioner with respect to this proposition are without merit

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for writ of certiorari should be denied. To hold otherwise would necessitate a finding that the conversations between Agent Wise and the petitioner amounted to in-custody interrogation concerning the offense charged. A reading of the cases, and specifically the case of *Miranda v. Arizona*, supra, reveals that the courts, and specifically this Court, were concerned with oppressive methods and tactics used by law enforcement officers in an active interrogation. The facts in the case at bar in no way approach the factual situations dealt with in *Miranda*, or any other case of which respondent is aware, with reference to abuse of petitioner's constitutional rights. The respondent submits that the facts of this case showed no violation of petitioner's rights, constitutional or otherwise.

Respectfully submittted,

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